Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–72 OF 2001

JAMES FOONG, ZAINUN ALI AND SULONG MATJERAIE JJCA

17 FEBRUARY 2010

Labour Law — Trade union — Cancellation of registration — Employer refused recognition and sought cancellation of registration — Failure to appeal decision of Director of Trade Union to Minister — Whether remedy to appeal under s 71A of the Trade Unions Act 1959 must be exhausted before suit could be filed — Trade Unions Act 1959 ss 12(1) & 71A

The appellant initiated an action in the High Court over the registration of the second respondent under s 12(1) of the Trade Unions Act 1959 ('the Act') as a trade union of workmen by the first respondent. The appellant refused to accord recognition to the second respondent on the ground that legally a trade union cannot be registered to represent casual workers who are hired to work on weekends or on other race days only. The appellant claimed that the race day workers, being 'casual workers', did not come within the purview and ambit of the Act. The appellant contended that by registering the second respondent as a trade union, the first respondent had acted ultra vires the Act and thus his decision was a nullity. Counsel for the first respondent raised a preliminary objection on the grounds that before instituting the suit, the appellant ought to have exhausted the remedy of appeal which was available to him under s 71A of the Act which, inter alia, provides that any person who is dissatisfied with any specified decision of the Director General may appeal against the same to the Minister. The High Court dismissed the action based on the preliminary objection. Hence this appeal.

Held, dismissing the appeal with costs:

(1) This appeal did not fall within the exceptional circumstances for the court to consider the application for declaration, where there is an alternative remedy provided by statute (see para 22).

(2) It was premature to invite the court to review the decision of first respondent when the provision for appeal against the first respondent to the Minister is comprehensively laid down in the Trade Unions Act 1959. Thus there was no illegality in the action of first respondent. The word 'may' in the relevant provision of the Act gave an option to the

appellant to appeal to the Minister, rather than giving a right to apply for judicial review when there existed an alternative remedy (see paras 24–25).

[Bahasa Malaysia summary

Perayu telah memulakan tindakan di Mahkamah Tinggi bagi pendaftaran responden kedua di bawah s 12(1) Akta Kesatuan Sekerja 1959 ('Akta') sebagai kesatuan sekerja pekerja-pekerja oleh responden pertama. Perayu enggan menyetujui pengakuan kepada responden kedua atas alasan bahawa di bawah undang-undang, kesatuan sekerja tidak boleh didaftarkan untuk mewakili pekerja biasa yang diambil bekerja pada hujung minggu atau mana-mana race days sahaja. Perayu menghujahkan bahawa pekerja-pekerja race days telah bertindak melampaui bidang kuasa Akta dan oleh itu keputusannya adalah tidak sah. Peguam responden membangkitkan bantahan awal atas alasan bahawa sebelum memulakan tindakan, perayu seharusnya menghabiskan remedi rayuan yang terdapat di bawah s 71A Akta yang mana, inter alia, memperuntukkan bahawa sesiapa yang tidak berpuas hati dengan mana-mana keputusan oleh Ketua Pengarah boleh merayu terhadap Menteri yang sama. Mahkamah Tinggi menolak tindakan berdasarkan bantahan awal. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Rayuan ini tidak terjumlah di bawah hal keadaan luarbiasa bagi mahkamah mempertimbangkan permohonan deklarasi, di mana terdapat remedi alternatif yang diperuntukkan oleh statut (lihat perenggan 22).

(2) Adalah pra-matang untuk memohon kepada mahkamah menyemak semula keputusan responden pertama sedangkan peruntukan bagi rayuan terhadap responden pertama telah dinyatakan secara komprehensif dalam Akta Kesatuan Sekerja 1959. Oleh itu, tidak berlaku apa-apa yang menyalahi undang-undang dalam tindakan responden. Perkataan 'may' di dalam peruntukan relevan dalam Akta memberi pilihan kepada perayu untuk merayu kepada Menteri, berbanding memberi hak untuk memohon semakan kehakiman di mana wujud remedi alternatif (lihat perenggan 24–25).]

Notes

For cases on cancellation of registration, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1716–1718.

Cases referred to

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

A *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346, SC (refd)

Legislation referred to

Employment Act 1955 Part XII
B Societies Act 1966 ss 8A(c), 12(1)
Trade Unions Act 1959 ss 12(1), 71A
Trade Unions Regulations 1959

Appeal from: Originating Summons No 24–288 of 1995 (High Court, C Pulau Pinang)

Steven Thiru (Faisal Moideen with him) (Shook Lin & Bok) for the appellant.
Suzana Atan (P Subramaniam with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

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Zainun Ali JCA (delivering judgment of the court):

[1] In the High Court could, the appellant's claim was dismissed at the E initial stage of the trial, on a preliminary objection raised by the respondent. The objection was that the appellant had failed to exhaust the statutory appeal procedure/alternative remedy contained in s 71A of the Trade Unions Act 1959 ('the Act') before commencing the action in the High Court.

F **[2]** We heard this appeal and unanimously dismissed it with costs. Our reasons are as appended below.

BACKGROUND

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[3] The Penang Turf Club, through one of its public officer (s 8A(c) of the Societies Act 1966) initiated action in the High Court over the registration of the second respondent under s 12(1) of the Act as a trade union of workmen by the first respondent.

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[4] The first respondent is the Director General of Trade Unions ('the DGTU') whilst the second respondent is the Penang Turf Club Race Day Worker's Union ('the workers union').

I **[5]** The second respondent was registered under s 12(1) of the Trade Unions Act 1959. A certificate of registration of the second respondent sent a notice of claim for recognition, the certificate of registration and the rules of union to the appellant. However vide letter dated 13 February 1995 the appellant informed the second respondent that they were unable to accord

recognition to the second respondent on the ground that legally a trade union cannot be registered to represent casual workers who are hired to work on weekends or on other race days only. A

[6] In short, it was the appellant's case that the race day workers, being 'casual workers', do not come within the purview and ambit of the Act. B

[7] The appellant went on to contend that by registering the second respondent as a trade union, the first respondent (the DGTU) had acted ultra vires the Act and thus his decision was a nullity. C

[8] Against the defence of the first respondent that the registration of the second respondent as a trade union is regular and in compliance with the provisions of Trade Unions Act 1959 and the Trade Unions Regulations 1959, and the defence of the second respondent that the appellant's workers carried out work at the appellant's premise and that a good number of them have been so employed for over a decade, in the same job by the appellant, the appellant commenced proceedings by way of originating summons. D

[9] The appellant sought the following orders: E

(a) That the registration of the second respondent be declared null and void and of no effect;

(b) That the certificate of registration No 737 dated 22 November 1994 be revoked and cancelled. F

[10] The said originating summons was later converted to a writ action on 10 April 1996.

[11] Senior federal counsel who represented the first respondent raised a preliminary objection. This relates to the issue of non-exhaustion of remedies available to a party in a suit. Senior federal counsel contended that before instituting the suit, the appellant ought to have exhausted the remedy of appeal which was available to him, under s 71A of the Trade Unions Act 1959 reads: G H

Section 71A of the Trade Unions Act 1959 (TAB 1 of 1A (R1)) reads:

(1) Any person who is dissatisfied with any opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be, given, made or effected by the Director General under any of the following provisions: I

(a) section 2(2);

(b) section 12;

(c) section 15(2)(b) or section 15(4);
(d) section 16(1);
(e) section 17(1);
(f) section 25A 94);
(g) section 28(1) (d), or section 29(2)(b);
(h) section 34(2);
(i) section 40(6) or 40 (9);
(j) section 54(1);
(k) section 76A(1); or
(l) section 76C(1);

may, within thirty days from the date of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision of the Director General, appeal against the same to the minister, in such manner as may be prescribed by regulations.

(2) An appeal under subsection (1) shall not operate as a stay of execution of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be, of the Director General unless the Minister otherwise directs, and where he so directs he may impose such terms and conditions as he deem it fit.

(3) The Minister may, after considering any such appeal, give such decision thereon as he deems just and proper.

(4) A direction or decision of the minister under this section shall be final and conclusive.

[12] The first respondent substantiated its preliminary objection on the basis of authorities such as *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346 and *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 (SC).

[13] In the former case, the Supreme Court held that:

> … the appellant had a right of appeal against the decision of the High Court in refusing to hear the reference and thereof had failed to avail itself of the alternative remedy. It has accordingly no specific legal right to apply for mandamus in this case.

[14] In the latter case, Hashim Yeop Sani SCJ observed that:

> … the discretion is still with the court but where there is an appeal provision available to the application certiorari should not normally issue unless there is shown a clear lack of jurisdiction or blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

[15] The appellant on the other hand, contended at length to the following:

(a) that the appellant refused to recognise the second defendant since in their view, legally, a trade union cannot be registered to represent casual workers who are only hired to work on weekends or other race days;

(b) that these casual workers are mainly involved on race days which usually fall on the weekends and on public holidays. Should a worker be absent, a replacement worker would be hired or assigned the job. Where a worker is unable to turn up for work, he would not be paid any wage;

(c) the appellant does not exercise any disciplinary right over the workers to their attendance or absence. The matter is left entirely to the worker's free will as to whether they wish to work during the weekend or on race days to earn extra income;

(d) that these casual workers are in fact regularly employed elsewhere; and

(e) thus they do not fall within the purview of Part XII of the Employment Act 1955. They are also not entitled to any benefit under any collective agreement and as a result, they are not entitled to organise themselves and form a trade union of workers.

[16] The main defence of the first defendant was that the registration of the second defendant as a trade union is regular and in compliance with the provision of Trade Unions Regulations 1959 and the member of union are paid workers of Penang Turf Club.

[17] The second defendant's defences, inter alia, stated that they are paid fortnightly on a regular basis; they contribute to EPF and SOCSO which are deducted at source that the appellant exercises control over them through its totalisator manager and other staff over the manner in which the workers perform their work; that the workers are very much an integral part of the plaintiff's business; and lastly, that the appellant was wrong in commencing this suit without first exhausting its remedy under s 71 of the Amended Act (1994).

OUR FINDINGS

[18] The learned High Court judge ruled that the appellant had failed to demonstrate that the first respondent had acted unfairly or had abused his powers to warrant a judicial interference; or that it was more expedient to go for judicial review rather than to appeal.

[19] The learned High Court judge had considered the appellant's claim in the light of the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1.

[20] After having heard parties and reading the documents and material available before us, we were unanimous in dismissing the appellant's appeal with costs.

[21] Our grounds are as follows.

[22] We are of the view that this appeal does not fall within the exceptional circumstances for the court to consider the application for declaration, where there is an alternative remedy provided by statute.

[23] It is also our view that the first respondent had not acted ultra vires since he was merely exercising his function and duties under the Trade Unions Act 1959.

[24] In fact it is premature to invite the court to review the decision of the first respondent when the provision for appeal against the first respondent to the Minister is comprehensively laid down in the Trade Unions Act 1959. Thus there is no illegality in the action of the first respondent.

[25] Regarding the word 'may' in the relevant provision of the Act, we are of the view that this gives an option to the appellant to appeal to the Minister, rather than giving a right to apply for judicial review when there exists an alternative remedy.

[26] In the circumstances, since this appeal is dismissed with costs, the deposit is for this appeal is to be awarded to the respondent to account for taxed costs. The order of High Court is hereby affirmed.

Appeal dismissed with costs.

Reported by Kanesh Sundrum